



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

August 28, 2003

Mr. Bill Ainsworth
Assistant City Attorney
City of Corpus Christi
P. O. Box 9277
Corpus Christi, Texas 78469-9277

OR2003-6070

Dear Mr. Ainsworth:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 186895.

The City of Corpus Christi (the "city") received a request for "documents and photographs associated with the investigation of several Corpus Christi fire fighters and their involvement in a recent running event that culminated in a party at a downtown drinking establishment." You state that you will make some information available to the requestor. You claim that the remaining requested information is excepted from disclosure under sections 552.101, 552.107, 552.108 and 552.117 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.¹

Initially, we must address the city's obligations under section 552.301 of the Government Code. Section 552.301(b) of the Government Code provides that a governmental body that wishes to withhold requested information must "ask for the attorney general's decision and state the exceptions that apply within a reasonable time but not later than the 10th business day after the date of receiving the written request." Pursuant to section 552.301(e), the governmental body must, within fifteen business days of receiving the request, submit to this office (1) written comments stating the reasons why the stated exceptions apply that would allow the information to be withheld, (2) a copy of the written request for information, (3) a signed statement or sufficient evidence showing the date the governmental body received

¹We note that portions of the submitted information were submitted to this office and ruled on in Open Records Letter No. 2003-5419. However, because you have informed us that circumstances have changed since the issuance of that ruling, it may not be relied upon as a previous determination. See Open Records Letter No. 673 (governmental body may rely on previous determination when elements of law, fact, and circumstances have not changed, the records or information at issue are precisely the same records or information previously submitted to this office pursuant to section 552.301(e)(1)(D) of the Government Code, the governmental body that received the request for information is the same governmental body that previously requested and received a ruling from this office, and the prior ruling concluded that the precise records or information are or are not excepted from disclosure).

the written request, and (4) a copy of the specific information requested or representative samples, labeled to indicate which exceptions apply to which parts of the documents. Gov't Code § 552.301(e)(1)(A)-(D). Because you did not submit a signed statement or sufficient evidence showing the date the city received the written request, it is not clear to this office when the enclosed request was received. However, you indicate the request was made on June 11, 2003. We point out, however, that you did not submit written comments stating the reasons why the stated exceptions apply that would allow the information to be withheld or submit additional responsive information until your correspondence to this office post-marked July 3, 2003, which is outside the fifteen business day deadline. Thus, the city has failed to comply with the requirements of section 552.301.

Pursuant to section 552.302 of the Government Code, a governmental body's failure to comply with the procedural requirements of section 552.301 results in the legal presumption that the requested information is public and must be released unless the governmental body demonstrates a compelling reason to withhold the information from disclosure. *See* Gov't Code § 552.302; *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381-82 (Tex. App.—Austin 1990, no writ) (governmental body must make compelling demonstration to overcome presumption of openness pursuant to statutory predecessor to section 552.302); Open Records Decision No. 319 (1982). Generally speaking, a compelling reason exists when third party interests are at stake or when information is confidential under other law. Open Records Decision No. 150 (1977). Although you assert sections 552.107 and 552.108, these exceptions are discretionary exceptions under the Public Information Act (the "Act") and do not constitute compelling reasons sufficient to overcome the presumption of openness. *See* Open Records Decision Nos. 630 (1994) (section 552.107 is discretionary exception), 177 (1977) (governmental body may waive statutory predecessor to section 552.108); *see also* Open Records Decision Nos. 676 at 12 (2002) (compelling reason may be demonstrated for attorney-client privileged communications if it is shown that the release of the information would harm a third party), 665 at 2 n.5 (2000) (discretionary exceptions in general). However, the need of another governmental body to withhold information under section 552.108 can provide a compelling reason under section 552.302. *See* Open Records Decision No. 586 at 3 (1991). Although you raise section 552.108, your claim under this exception does not constitute a compelling reason to withhold the information in question. Likewise, you have not demonstrated a compelling reason to withhold the information under section 552.107. Therefore, you may not withhold the submitted information under sections 552.107 or 552.108 of the Government Code. On the other hand, because sections 552.101 and 552.117 can provide compelling reasons for withholding information, we will address your arguments under those exceptions.

Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." This section encompasses information another statute makes confidential, such as section 143.089 of the Local Government Code. We understand that the city is a civil service city under chapter 143 of the Local Government Code. Section 143.089 contemplates two different types of personnel files, a fire fighter's civil service file that the civil service director is required to maintain, and an internal file that the fire department may maintain for its own

use. Local Gov't Code § 143.089(a), (g). Information maintained in a fire department's internal file pursuant to section 143.089(g) is confidential and must not be released. *See City of San Antonio v. San Antonio Express-News*, 47 S.W.3d 556 (Tex. App.—San Antonio 2000, pet. denied).²

However, in cases in which a fire department investigates a fire fighter's misconduct and takes disciplinary action against a firefighter, it is required by section 143.089(a)(2) to place all investigatory records relating to the investigation and disciplinary action, including background documents such as complaints, witness statements, and documents of like nature from individuals who were not in a supervisory capacity, in the fire fighter's civil service file maintained under section 143.089(a). *Abbott v. Corpus Christi*, No. 03-02-00785-CV, slip op., 2003 WL 21241652, at *7 (Tex. App.—Austin May 30, 2003, no pet. h.). All investigatory materials in a case resulting in disciplinary action are "from the employing department" when they are held by or in possession of the department because of its investigation into a fire fighter's misconduct, and the department must forward them to the civil service commission for placement in the civil service personnel file. *Id.* at *5, *7. Such records are not confidential and are subject to release under the Act, unless an exception under the Act applies. *See* Local Gov't Code § 143.089(f); Open Records Decision No. 562 at 6 (1990); *see also City of San Antonio v. Texas Attorney General*, 851 S.W.2d 946, 949 (Tex. App.—Austin 1993, writ denied).

You inform this office that two of the involved fire fighters resigned from the fire department, and therefore no disciplinary action was taken against them. Therefore, we find that the information which is or may be maintained in the fire department's internal personnel file that the fire department maintains related to the two fire fighters who were not disciplined is confidential pursuant to section 143.089(g) of the Local Government Code and must be withheld under section 552.101 of the Government Code.

However, you also inform us that four of the fire fighters at issue were suspended by the city for a month, and that one firefighter was terminated. Chapter 143 addresses the following types of disciplinary actions: removal, suspension, demotion, and uncompensated duty. *See* Local Gov't Code §§ 143.051-.055. Therefore, the conduct of these five firefighters resulted in disciplinary action as contemplated by chapter 143. While information related to the incident in question may be kept in the fire department's personnel file, information relating to disciplinary action under chapter 143 must also be kept in the civil service personnel file. Local Gov't Code §§ 143.052, .089(a)(2), (3). Because this information must be placed in the city's civil service file under section 143.089(a), it is subject to disclosure under the Act. *See* Local Gov't Code § 143.089(f); Open Records Decision No. 562 at 6 (1990). However, information that is subject to public disclosure may still be excepted under the exceptions in chapter 552 of the Government Code. We will now address your claimed exceptions for this information.

²We note that section 143.089(g) requires a fire department who receives a request for information maintained in a file under section 143.089(g) to refer that person to the civil service director or the director's designee.

Section 552.117(a)(1) of the Government Code excepts from public disclosure the present and former home addresses and telephone numbers, social security numbers, and family member information of current or former officials or employees of governmental body who timely request that such information be kept confidential under section 552.024. Whether a particular piece of information is protected by section 552.117 must be determined at the time the request for it is made. *See* Open Records Decision No. 530 at 5 (1989). Therefore, pursuant to section 552.117(a)(1), the city must withhold the above-listed information for all current or former officials or employees who elected, prior to the city's receipt of this request, to keep such information confidential. The city may not withhold such information under section 552.117 for anyone who did not make a timely election. We have marked the information that must be withheld if section 552.117 applies.

We also note that the submitted information contains a Texas driver's license number. Section 552.130 of the Government Code excepts from disclosure "information [that] relates to . . . a motor vehicle operator's or driver's license or permit issued by an agency of this state." We have marked the information that the city must withhold pursuant to section 552.130.

Finally, you argue that portions of the submitted information should be withheld under section 552.101, which also encompasses the doctrine of common-law and constitutional privacy. Common law privacy protects information if (1) the information contains highly intimate or embarrassing facts the publication of which would be highly objectionable to a reasonable person, and (2) the information is not of legitimate concern to the public. *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). The type of information considered intimate and embarrassing by the Texas Supreme Court in *Industrial Foundation* included information relating to sexual assault, pregnancy, mental or physical abuse in the workplace, illegitimate children, psychiatric treatment of mental disorders, attempted suicide, and injuries to sexual organs. 540 S.W.2d at 683.

Constitutional privacy consists of two interrelated types of privacy: (1) the right to make certain kinds of decisions independently and (2) an individual's interest in avoiding disclosure of personal matters. Open Records Decision No. 455 at 4 (1987). The first type protects an individual's autonomy within "zones of privacy" which include matters related to marriage, procreation, contraception, family relationships, and child rearing and education. *Id.* The second type of constitutional privacy requires a balancing between the individual's privacy interests and the public's need to know information of public concern. *Id.* The scope of information protected is narrower than that under the common law doctrine of privacy; the information must concern the "most intimate aspects of human affairs." *Id.* at 5 (citing *Ramie v. City of Hedwig Village, Texas*, 765 F.2d 490 (5th Cir. 1985)).

This office has found that the following types of information are excepted from required public disclosure under constitutional or common law privacy: some kinds of medical information or information indicating disabilities or specific illnesses, *see* Open Records Decision Nos. 470 (1987) (illness from severe emotional and job-related stress), 455 (1987)

(prescription drugs, illnesses, operations, and physical handicaps), personal financial information not relating to the financial transaction between an individual and a governmental body, *see* Open Records Decision Nos. 600 (1992), 545 (1990), information concerning the intimate relations between individuals and their family members, *see* Open Records Decision No. 470 (1987), and identities of victims of sexual abuse, *see* Open Records Decision Nos. 440 (1986), 393 (1983), 339 (1982).

After reviewing your arguments and the submitted information, we conclude that none of this information is protected by common-law or constitutional privacy. *See* Open Records Decision Nos. 470 (1987) (public employee's job performance does not generally constitute his private affairs), 455 (1987) (public employee's job performances or abilities generally not protected by privacy), 444 (1986) (public has legitimate interest in knowing reasons for dismissal, demotion, promotion, or resignation of public employees), 438 (1986) (work behavior of a public employee and the conditions for the employee's continued employment are matters of legitimate public interest not protected by the common-law right of privacy), 423 at 2 (1984) (explaining that because of the greater legitimate public interest in the disclosure of information regarding public employees, employee privacy is confined to information that reveals "intimate details of a highly personal nature"). Therefore, they city may not withhold any of the submitted information under section 552.101 in conjunction with common-law or constitutional privacy.

In summary, we conclude that the information which is or may be maintained in the fire department's internal personnel file that the fire department maintains related to the two fire fighters who were not disciplined is confidential pursuant to section 143.089(g) of the Local Government Code and must be withheld under section 552.101 of the Government Code. However, information related to the incident in question for the five firefighters who received disciplinary action must also be kept in the civil service personnel file and is subject to public disclosure. Nonetheless, because information that is subject to public disclosure may still be excepted under the exceptions in chapter 552 of the Government Code, the city must withhold the following from the documents subject to disclosure: (1) if the individuals in question timely elected to keep their personal information confidential under section 552.024, the city must withhold the information we have marked under section 552.117, and (2) the city must withhold the information we have marked under section 552.130. The remainder of the documents subject to disclosure must be released to the requestor.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full

benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

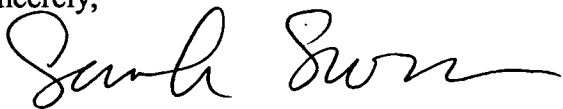
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at (512) 475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,

A handwritten signature in black ink, appearing to read "Sarah Swanson", with a stylized, flowing script.

Sarah I. Swanson
Assistant Attorney General
Open Records Division

SIS/lmt

Ref: ID# 186895

Enc. Submitted documents

c: Mr. Robert Gonzalez
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